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No. 95-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS

Petitioner,

V.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; AND DELTA PRODUCTION CREDIT ASSOCIATION.

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the subject-matter jurisdiction issue raised by the United States as *amicus curiae*.

STATEMENT

Contrary to the claim of the United States as *amicus*, no current conflict exists between the circuits regarding the application of the federal instrumentality exception to the Tax Injunction Act, 28 U.S.C. 1341, when the United States is not a co-plaintiff. The rule currently applied is that federal instrumentalities may invoke the exception if they are acting in a governmental capacity. Respondents are clearly entitled to invoke the federal instrumentality exception because they are federal instrumentalities engaged in the performance of an important governmental function.

DISCUSSION

The federal instrumentality exception to the Tax Injunction Act was most recently considered in *Simon v. Cebrick*, 53 F.3d 17 (3rd Cir. 1995), a case which is not discussed by *amicus*. *Simon* involved an action by the Federal Deposit Insurance Corporation ("FDIC") to protect its mortgage interest in certain property against a third party's attempt to foreclose real estate tax liens. To determine whether the federal instrumentality exception applied, the Third Circuit considered whether the FDIC was acting in a governmental capacity in protecting its interest in the property. The court concluded that the FDIC was acting in a governmental capacity, stating:

> The district court's application of this section [12 U.S.C. § 1825(b)(2)] to protect the FDIC's lien interest from being foreclosed without its consent does not violate the TIA, even if it were applicable, because the FDIC is acting in a governmental capacity when it winds up the affairs of failed banking institutions pursuant to FIRREA. In light of the governmental role played by the FDIC in the instant case, we find that it qualifies for the federal instrumentality exception to the TIA.

Id. at 23 (bracketed material added).

The Third Circuit's approach to the federal instrumentality exception in Simon is consistent with the approach used by the First, Second and Fifth Circuits. These courts also hold that the applicability of the exception turns on whether the federal agency or instrumentality is performing a governmental function in connection with the activity underlying the law suit.

The First Circuit considered this issue most recently in *Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600 (1st Cir. 1993). The court described the applicable standard as follows:

> [W]e have instituted a flexible test in which 'each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.'

Id. at 602-603 (*quoting Federal Reserve Bank v. Comm'r of Corporations and Taxation*, 499 F.2d 60, 64 (1st Cir. 1974)).[1] The Second Circuit considered this issue in *Federal Deposit Ins. Corp. v. New York*, 928 F.2d 56 (2d Cir. 1991). The court refused to apply the federal instrumentality exception because the FDIC was attempting to protect only the interests of commercial lending institutions, not the federal government. *Id.* at 59. The Fifth Circuit considered this issue most recently in *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991). The court cited with approval the First Circuit standard, and found that the Federal Savings and Loan Insurance Corporation ("FSLIC") and the FDIC were entitled to invoke the federal instrumentality exception in a case involving a tax assessment against property in which they had a direct interest. *Id.* at 613.

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[1] *Amicus* misdescribes the First Circuit's opinion, claiming that the First Circuit found

> [A] conflict among the circuits exists as to when a 'federal instrumentality' may invoke the exception to the Tax Injunction Act for the 'United States and its instrumentalities.'

(Brief of the U.S. as *amicus* at 13). The First Circuit found no such conflict. It merely observed that

> Courts differ on whether the FDIC qualifies for the exception.

Bank of New England, 986 F.2d at 602.

The rule in these cases is that where the federal agency or instrumentality is found to be performing a governmental role, the federal instrumentality exception applies.[2] Where only private interests are served, the federal instrumentality exception does not apply. It is also instructive that in none of these cases did the court even comment on the presence or absence of the United States as a party.

The only decision which even arguably applies a different analysis from the other circuits is *Housing Authority of Seattle v. Washington*, 629 F.2d 1307 (9th Cir. 1980). In that case, the court held that the federal instrumentality exception could be invoked only if the United States was a party to the lawsuit. However, the court went on to specifically reserve the question of whether the United States must be a party in all cases. *Id.* at 1311.

The continued vitality of the *Housing Authority* decision, even in the Ninth Circuit, is open to question. *See California Credit Union League v. City of Anaheim*, 95 F.3d 30 (9th Cir. 1996) (possible application of the Tax Injunction Act was neither raised nor noted, even though the United States was not a party to the suit). In sum, if there is a conflict in the circuits on the applicability of the federal instrumentality exemption, it exists by virtue of a single Ninth Circuit decision which has been ignored by the other circuits.

Without citation to any authority, *amicus* claims that respondents are not entitled to invoke the federal instrumentality exception. While *amicus* acknowledges that respondents are

[2]A similar analysis has been applied by the federal district courts. *Federal Land Bank of Wichita v. Board of County Commissioners*, 582 F.Supp. 1507 (D. Colo. 1984) (Federal Land Bank was performing a governmental function and could invoke the federal instrumentality exception to the Tax Injunction Act), and *Northeast Federal Credit Union v. Neves*, 664 F.Supp. 640 (D. N.H. 1987) (federal credit union may invoke the federal instrumentality exception to the Tax Injunction Act).

"statutorily defined instrumentalities of the United States" (Brief of the U.S. as *amicus at 2*), *amicus* fundamentally misapprehends the governmental role and function which respondents perform. Both this Court and Congress have repeatedly confirmed that the member institutions of the Farm Credit System perform an important governmental function - the extension of reliable and affordable credit to agricultural borrowers.

In *Federal Land Bank of St. Louis v. Bismarck Lumber*, 314 U.S. 95 (1941), this Court characterized the Federal Land Banks, also member institutions of Farm Credit System, as follows:

> They are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.' *Federal Land Bank v. Priddy*, 295 U.S. 229, 231; *Federal Land Bank v. Gaines*, 290 U.S. 247, 254.

Id. at 102. The governmental function performed by Farm Credit System institutions was reconfirmed in *Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146 (1961). In response to the claim that the Federal Land Banks were engaged in commercial or proprietary activity, this Court stated:

> Legitimate activities of governments are sometimes classified as 'governmental' or 'proprietary'; however, our decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed.

Id. at 150-51.

The Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, further reaffirmed the federal instrumentality

status of respondents. Congress amended Section 2(a) of the Farm Credit Act, 12 U.S.C. § 2071(a), to read as follows:

> Each Production Credit Association shall continue as a federally chartered instrumentality of the United States.

The legislative history of the Agricultural Credit Act of 1987 emphasizes the important governmental function which System institutions continue to perform. The Agricultural Credit Act of 1987 authorized up to $4 billion dollars of federal financial assistance to the System. Farm Credit Act § 6.26(a), 12 U.S.C. 2278b-6. The Senate Report explains the need for this federal financial assistance package:

> Life insurance companies and commercial banks have also experienced [agricultural loan] losses comparable in percentage terms to those of the FCS but the diversified nature of their total loan portfolio limits the effect of these losses on their earnings and net worth. In response to these losses virtually all life insurance companies have suspended their farm loan programs. Similarly many commercial banks are unwilling to take on new customers and farm loan losses have resulted in a significant number of bank failures among small agricultural banks. *This contraction in the number of institutions willing to supply credit to farmers makes it even more important that the FCS remain a viable source of credit to agriculture during good times and bad.*

S. Rep. No. 230, 100th Cong., 1st Sess. 14 (1987) (emphasis added).

CONCLUSION

Since their inception and continuing to the present day, respondents and the other members of the Farm Credit System have been repeatedly recognized as federal instrumentalities performing an important governmental function. They are entitled to invoke the federal instrumentality exception to the Tax Injunction Act. The district court was correct in holding that it had jurisdiction in this case. That decision is fully consistent with the current views of other federal courts and does not warrant this Court's review.

Respectfully submitted,

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